Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1854 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRA BANKS,

Petitioner,

v.

FINLEY-SELIGMAN & LATZ, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner's filing on November 26, 1985, of a Petition for Writ of Certiorari from an order of the Seventh Circuit Court of Appeals dated October 29, 1984, affirming a grant of summary judgment of the District Court for the Eastern District of Wisconsin dismissing Petitioner's claim of race discrimination due to the method of calculating compensation under 42 U.S.C. §2000e-2 is timely.

2. Whether the Seventh Circuit properly determined that the evidence received at the hearing on remand in District Court supported the District Court's finding that the Employer did not, in violation of 42 U.S.C. §2000e-3, discharge the Petitioner in retaliation for filing a Complaint with the Equal Employment Opportunity Commission, hereinafter "EEOC," for race discrimination.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Ira Banks, and the Respondent, Finley, a Division of Seligman & Latz, Inc.

Seligman & Latz, Inc. is a general partner in Seligman & Latz Acquisition Company, L.P., a Delaware limited partnership. Goldome Savings Bank and American Savings Bank F.S.B. are limited partners.

Finley is a Division of Seligman & Latz Acquisition Company, L.P.

Seligman & Latz Acquisition Company, L.P. has various subsidiaries in the beauty business in Canada, Mexico and Puerto Rico. Seligman & Latz Acquisition Company, L.P. has various non-operatings name-holder subsidiaries.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTORY PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND RULES INVOLVED	4
STATEMENT OF THE CASE	6
SUMMARY OF THE ARGUMENT	8
REASONS FOR DENYING WRIT	9
I. PETITIONER'S PETITION FOR WRIT OF CERTIORARI ON RACE DISCRIMINATION (WAGES) CLAIM IS UNTIMELY	9
II. NONE OF THE CONSIDERATIONS VIEWED BY THE COURT IN RULE 17 AS A BASIS FOR GRANTING CERTIORARI WILL BE ADVANCED BY GRANTING THIS PETITION	10
III. PETITIONER SEEKS REVIEW OF A SEVENTH CIRCUIT DECISION WHICH TURNS SOLELY UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED AND AS SUCH IS NOT PROPER FOR A GRANT OF CERTIORARI	11
IV. PETITIONER HAS BEEN GIVEN THE OPPORTUNITY OVER THE PAST SIX YEARS TO FULLY LITIGATE HIS CLAIMS AGAINST THE RESPONDENT	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Anderson v. City of Bessemer City, 105 S.Ct. 1504	8
Graver Manufacturing Company v. Lind Company, 336 U.S. 271 (1949)	11
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	8, 10
NLRB v. Pittsburgh Steamship Company, 340 U.S. 498 (1951)	10, 12
United States v. ITT Continental Baking Company, 420 U.S. 223 (1975)	11
United States v. Johnston, 268 U.S. 220 (1925)	11

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Finley-Seligman & Latz, Inc., respectfully prays that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 4, 1985 and denied for rehearing on September 26, 1985 be denied.

OPINIONS BELOW

None of the opinions of the District Court or the Court of Appeals are published. They are included for the Court's review in Respondent's Appendix, hereinafter "Resp. App."

The District Court for the Eastern District of Wisconsin granted summary judgment on October 13, 1983 in Case No. 80-C-1056 (Resp. App. 1-5.) On October 29, 1984, Case No. 83-2981, the United States Court of Appeals for the Seventh Circuit affirmed in part and reversed and remanded in part the grant of summary judgment from the District Court. The Court of Appeals affirmed the dismissal of the race discrimination (wages) claim based on 42 U.S.C. §2000e-2 and 42 U.S.C. §1981. The Court remanded Petitioner's retaliation (discharge) claim based on 42 U.S.C. §2000e-3 for further proceedings. (Resp. App. 6-9.)

On January 10, 1985, the District Court on remand entered a decision finding that the Plaintiff was not discharged in retaliation for filing a prior Complaint with the EEOC, Case No. 85-C-1056. (Resp. App. 10.) The Seventh Circuit affirmed the decision of the District Court in Case No. 85-1188 on September 4, 1985. (Resp. App. 11-16.) A Motion for Rehearing was denied on September 26, 1985. (Resp. App. 17.)

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §§1981, 2000e-2 and 2000e-3, the Petitioner brought suit against his former employer, Finley-Seligman & Latz, Inc. in the Eastern District of Wisconsin. On October 13, 1983, the District Court granted Defendant's Motion for Summary Judgment on all claims.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit on November 7, 1983 and on October 29, 1984, the Seventh Circuit affirmed the District Court's dismissal of Petitioner's racial discrimination (wages) claim finding the Respondent did not violate 42

U.S.C. §§1981 and 2000e-2 of Title VII of the Civil Rights Act of 1964, as amended. However, the Seventh Circuit reversed and remanded the District Court's grant of summary judgment on the retaliation (discharge) claim on the grounds that Petitioner's counter-affidavits "raised disputed issues of fact that are material to the disposition of his retaliation claim."

On January 10, 1985, the District Court held a day long evidentiary hearing in accordance with the decision of the Seventh Circuit. After hearing testimony from both parties, the Court entered judgment for the Respondent finding that the Petitioner was not discharged in retaliation for filing a prior Complaint with the EEOC.

Petitioner appealed the District Court's decision on remand to the Seventh Circuit which affirmed the judgment on September 4, 1985. The Petitioner sought rehearing from the Seventh Circuit which all judges on the panel voted to deny on September 26, 1985. A Petition for Writ of Certiorari was docketed by the United States Supreme Court on November 26, 1985 requesting review of the September 4, 1985 decision of the Seventh Circuit - the retaliation (discharge) claim.

Petitioner's attempt to have this Court grant a Writ of Certiorari to review allegations of race discrimination (wages) is untimely. The decision of the Seventh Circuit to which this writ is addressed affirmed a judgment by the District Court on remand finding the Respondent-Employer did not discharge the Petitioner in retaliation for filing an EEOC charge. (Resp. App. 11-16.) The Seventh Circuit did not address a claim of race discrimination (wages) in its September 4, 1985 decision, nor was such a claim before the District Court on remand because the Seventh Circuit had affirmed the District Court's original dismissal of the claim on October 29, 1984. (Resp. App.6-9.) Petitioner did not appeal the October 29, 1984 decision of the Seventh Circuit affirming the dismissal of the race discrimination (wages) claim.

To be timely, a petition must be applied for within 90

days from the date the Order was entered. 28 U.S.C. §2101(c). A Petition for Certiorari regarding Petitioner's race discrimination (wages) was not applied for until November 26, 1985, well over 90 days from the date of judgment, therefore his petition as to this issue is untimely.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The relevant statutes and rules involved are as follows:

Statutes:

28 U.S.C. §1254(1)

> **§1254. Courts of appeals; certiorari; appeal; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2101(c)

> **§2101. Supreme Court; time for appeal or certiorari; docketing stay**
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

42 U.S.C. §2000e-3

§2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§2000e-2000e-17].

Rules:

Supreme Court Rule 17. Considerations Governing Review on Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has

rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

STATEMENT OF THE CASE

Finley-Seligman & Latz, Inc., the Respondent herein, is engaged in the business of selling and repairing fine jewelry, watches and similar items. The Respondent employed individuals as jewelers and watchmakers who performed substantially different functions and duties.

Petitioner, Ira Banks, was hired by Respondent as a jeweler in 1972. On November 28, 1978, Petitioner filed a

discrimination claim against Respondent with the EEOC alleging that Respondent's pay system was discriminatory because it caused him to be paid less than certain white employees. Petitioner left Respondent's employment 16 months later on March 28, 1980. At that time, he filed a second discrimination claim with the EEOC alleging that he had been discharged in retaliation for protected Title VII activity. After receiving "right-to-sue" letters from the EEOC on the two separate charges, Petitioner brought suit against his former employer in the Eastern District of Wisconsin raising both claims.

On October 13, 1983, the District Court granted summary judgment holding that Respondent's decision not to compensate Petitioner, jeweler, in the same manner as watchmakers, was supported by a valid business purpose and was not discriminatory. The District Court also granted summary judgment on the Petitioner's second claim that he was terminated from his employment in retaliation for filing the race discrimination charge with the EEOC. (Resp. App. 1-5.) By Order dated October 29, 1984, the Seventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment on the racial discrimination (wages) claim and on the 42 U.S.C. §1981 claim but reversed and remanded the retaliation (discharge) claim. The Court found that the Affidavits of the Respondent in this case and the Petitioner's counter-affidavit raised disputed issues of fact that are material to the disposition of the retaliation (discharge) claim. In light of this factual dispute, the Court remanded back to the District Court for further proceedings. (Resp. App. 6-9.)

On January 10, 1985 the District Court held a full evidentiary hearing in accordance with the decision of the Seventh Circuit. After hearing testimony from both parties, the Court entered judgment finding the Petitioner was not discharged in retaliation for filing a prior Complaint with the EEOC. (Resp. App. 10.)

The Seventh Circuit, on September 4, 1985, affirmed this decision finding ample evidence in the record which sup-

ported the District Court's finding. (Resp. App. 14-16.)[1] The Court found that the case hinged on a question of credibility which it was hesitant to second-guess on appeal absent clear error. [See *Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1512-13 (1985).]

The Court carefully examined the record and construed Petitioner's *pro se* briefs liberally, proceeding step-by-step to determine whether Petitioner established a *prima facie* case consistent with *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), whether there was evidence of a legitimate business reason and whether the business reasons were not a mere pretext. On November 26, 1985, Petitioner applied for Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court should deny Petitioner's Petition for Writ of Certiorari. Any attempt by Petitioner to have this court review the dismissal of his race discrimination claim (wages) is untimely. The final judgment on that claim was rendered by the Seventh Circuit on October 29, 1984, but a Petition for Certiorari was not applied for until November 26, 1985. This is well past the 90 day time limitations of 28 U.S.C. §2101(c).

The remaining issues which Petitioner raises in his Petition for Writ of Certiorari present none of the important factors or considerations viewed by the Court as a basis for granting certiorari.

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[1]The District Court based its dismissal on a finding that there was no record that any retribution was ever taken against the Petitioner during the 16 month period he worked for Respondent following the filing of the first EEOC Complaint. The Court further held the evidence clearly demonstrated that on March 28, 1980, the Petitioner was not discharged but rather "walked off the job" after being given the opportunity to perform work he had refused to perform before. Petitioner himself was unable to point to other instances of harassment or discrimination arising from the initial EEOC charge. (Resp. App. 11-16.)

There is no conflict in decision between courts or a conflict with the manner in which the Seventh Circuit decided this case and the manner in which this Court itself would decide the case. In fact, the Seventh Circuit followed the standards and precedent of this Court.

None of the questions presented by Petitioner are of importance to the public in general. The questions involve only concerns applied to this discreet set of facts. Not only are the issues not of broad and general importance, but also the Petitioner is attempting to have this Court make an independent determination of credibility of witnesses and of the proper interpretation of given facts as they apply to this particular situation. A determination well within the expertise of the Seventh Circuit and the District Court and not important enough to waste this Court's time on.

Therefore, the Respondent, Finley-Seligman & Latz, Inc., respectfully prays that this Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I. *PETITIONER'S PETITION FOR WRIT OF CERTIORARI ON RACE DISCRIMINATION (WAGES) CLAIM IS UNTIMELY.*

As challenged in the Jurisdiction Statement, Petitioner's attempt to have the Court grant a Writ of Certiorari to review allegations of race discrimination (wages) is untimely. This issue was finally disposed of by the Seventh Circuit on October 29, 1984 when it affirmed the District Court's grant of summary judgment. The time for petitioning this court would have run on January 27, 1985. Petitioner did not petition this Court for Certiorari until November 26, 1985.

II. *NONE OF THE CONSIDERATIONS VIEWED BY THE COURT IN RULE 17 AS A BASIS FOR GRANTING CERTIORARI WILL BE ADVANCED BY GRANTING THIS PETITION.*

Supreme Court Rule 17 makes it clear that a review on Writ of Certiorari is not a matter of right, but a matter of judicial discretion and will be granted only when there are special and important reasons for granting such. The rule enumerates some general categories which, while not exhaustive, indicate the "character of reasons that will be considered."

One of the first factors the Court looks to in granting the Petition is whether or not there is a conflict in decision between courts or a conflict with a Supreme Court decision. The Petitioner fails to point out any conflict in the decisions of different courts and Respondent has itself failed to find any.

Each time the Seventh Circuit considered the Title VII claims of Petitioner, it applied the same standards to its resolution of the Title VII issues as followed by all other courts, both state and federal, and as clearly enunciated by this Court in *Griggs v. Duke Power Company,* 401 U.S. 424, 429-430 (1971). [See also *McDonnell Douglas,* 411 U.S. 792 cited by the Seventh Circuit Court of Appeals in its September 4, 1985 Order.]

Another purpose for which the United States Supreme Court grants writ is to settle questions which are of importance to the public in general as distinguished from just the parties involved. *NLRB v. Pittsburgh Steamship Company,* 340 U.S. 498, 502 (1951). The facts of this case are not sufficiently of general importance to warrant a grant of certiorari by the United States Supreme Court. The rules applied by the Seventh Circuit in this case were standards developed by the United States Supreme Court itself and applied to the unique, particular fact situation involved. The standards were applied to this case consistent with the manner in which the United States Supreme Court itself would have

applied the standards. Where an issue concerns only a particular order as applied to a discrete set of facts the case does not merit the Court's grant of a Petition for Certiorari. *United States v. ITT Continental Baking Company,* 420 U.S. 223, 227 (1975).

III. *PETITIONER SEEKS REVIEW OF A SEVENTH CIRCUIT DECISION WHICH TURNS SOLELY UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED AND AS SUCH IS NOT PROPER FOR A GRANT OF CERTIORARI.*

The Supreme Court has held that it will usually deny certiorari when a review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. They will not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). The Court has stated it is even less likely to grant a petition to review a factual issue where the findings of fact made by the District Court have received the concurrence of the Court of Appeals. "[A] court of law, such as this court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Manufacturing Company v. Lind Company,* 336 U.S. 271, 275 (1949).

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's orders unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit

> Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' [Citation omitted.] *NLRB v. Pittsburgh Steamship Company,* 340 U.S. at 503.

This case is such a case which turns upon an observation and interpretation of the particular given facts. The Seventh Circuit Court of Appeals itself in its September 4, 1985 order held:

> Basically this case hinges on a question of credibility which we are hesitant to second-guess on appeal absent clear error. *Anderson v. City of Bessemer,* _____ U.S. _____, 105 S.Ct. 1504, 1512-13 (1985); *In re Lemmon & Company, Inc.,* 742 F.2d 1064, 1070 (7th Cir. 1984); *Luedtke Engineering Company v. Industrial Lime Stone Company,* 740 F.2d 598, 601 (7th Cir. 1984); *Walsh v. Brewer,* 733 F.2d 473, 477 (7th Cir. 1984).

Ample evidence supported the District Court's determination that Banks was not discharged in retaliation for filing a discrimination claim. Sixteen months passed between the time that Banks filed his discrimination claim and his subsequent termination of employment with the Defendant. Banks himself was unable to point to overt instances of harrassment or discrimination arising from the discrimination charge which he filed. [Footnote omitted.] Although Banks testified that Sadow fired him in retaliation for filing the claim, both Sadow and Frenik testified otherwise. As such, the Seventh Circuit agreed with the District Court that Banks failed to establish that he was terminated in retaliation for filing a discrimination claim against the Defendant. (Resp. App. 14-16.)

IV. *PETITIONER HAS BEEN GIVEN THE OPPORTUNITY OVER THE PAST SIX YEARS TO FULLY LITIGATE HIS CLAIMS AGAINST THE RESPONDENT.*

Throughout the past six years, Petitioner has been given a chance to litigate his claim extensively and repeatedly in front of a number of tribunals. By the records established in each of these forums, it is obvious that Petitioner's claims were not lightly brushed aside.

The litigation of Petitioner's claims began on November 28, 1978 when Petitioner filed his first race discrimination claim relating to methods of payment with the EEOC. Sixteen months later, on or about March 28, 1980, Petitioner left Respondent's employment and filed his second discrimination claim with the EEOC alleging retaliation. The EEOC issued "right-to-sue" letters on each of the two separate charges.

On or about November 24, 1980, Petitioner filed his first *pro se* Complaint with the District Court. The pleadings were revised and amended and ultimately all claims were dismissed on October 13, 1983 by summary judgment.

On October 29, 1984 the United States Court of Appeals for the Seventh Circuit affirmed in part the decision of the District Court and reversed and remanded in part. The portion of the District Court's decision which the Seventh Circuit affirmed held that the Respondent did not engage in racial discrimination with regard to Petitioner's compensation and that they did not violate 42 U.S.C. §1981 of Title VII of the Civil Rights Act of 1964, as amended. More specifically, the Seventh Circuit found in its decision that the Petitioner failed to establish a *prima facie* case of discrimination. The Court found that the Petitioner failed to establish any disparate impact on minority group members of the facially neutral employment standard of Respondent. But, as to the retaliation claim, the Seventh Circuit held that the Affidavits of Respondent and the countering Affidavits of Petitioner established a factual dispute a reso-

lution of which could only be had by additional hearings. Consequently, the Seventh Circuit remanded the retaliation claim for further proceedings consistent with its opinion.

A full hearing was held on January 10, 1985 with testimony taken from both sides and the District Court rendered a decision for Respondent. Petitioner again appealed to the Seventh Circuit. After a thorough examination of the record, the Seventh Circuit affirmed.

The facts have been repeatedly reviewed and evaluated. The Courts have given Petitioner every opportunity to establish his case. In fact, during the hearing in District Court, Judge Reynolds attempted to help Petitioner present the necessary evidence. There was simply no evidence of retaliatory discharge to be had.

CONCLUSION

The issue of retaliatory discharge has been considered twice by the District Court for the Eastern District of Wisconsin and twice by the Seventh Circuit Court of Appeals. The District Court held a full hearing on the issue and gave the Petitioner every opportunity possible to present sufficient evidence to sustain his case. No such sufficient factual basis was forthcoming.

Likewise, the Seventh Circuit carefully examined the record on appeal and determined the issue was one of credibility and found ample evidence in the record to uphold the decision of the District Court.

The Petitioner is not asking this Court to resolve a conflict of decision between courts, neither is he asking this Court to resolve an issue of importance to the public in general. What Petitioner is asking this Court to do is substitute its judgment as to the credibility and sufficiency of evidence as it applies to a unique factual situation — a private dispute affecting only two parties.

The questions which Petitioner seeks to present to this

Court are not in the nature of those which the Court itself has deemed important enough for its consideration. As such, Respondent respectfully requests Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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